EVIDENCE – WORK PRODUCT – Arizona law
Revised 11/2009

In *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) the United States Supreme Court established that work product may be in the form of *facts* or *opinions* gained or formed in anticipation of trial. *Facts* are discoverable when (1) they are essential to the preparation of a party's case; and (2) the party seeking discovery can show adequate reasons for compelling the discovery. *Id.* at 511. The *opinions* or *theories* of a lawyer or one of her staff members are discoverable only upon a much greater showing of need or hardship.

Arizona codified the work-product doctrine in Rule 15.4(b), Ariz. R. Crim. P.:

(b) Materials Not Subject to Disclosure:

> (1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers, or of defense counsel or defense counsel's legal or investigative staff.

In *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 192, 777 P.2d 686, 690 (1989), the Arizona Supreme Court explained the rationale behind the work product doctrine, citing *Hickman*:

> Recognizing that justice is best served by thorough preparation of a client's case, the *Hickman* Court noted that this demands that an attorney investigate, compile actual information, plan strategy, and formulate legal theories without interference from the opposing party. If unfettered scrutiny of an attorney's files were allowed, counsel often would be reluctant to fully inquire into the merits of a case for fear that opposing counsel might obtain the information simply by asking.

Ybarra, 161 Ariz. at 192, 777 P.2d at 690 (1989) (citations omitted). The *Ybarra* court noted that the Arizona Criminal Rules explicitly recognize that criminal discovery is

based on a principle of "equal access to information." *Id.* at 194, 777 P.2d at 692. Rule 15.1(g), for defendants, and Rule 15.2(g), for the State, "allow a party to obtain material on a showing of 'substantial need' of the material, which the party cannot obtain without 'undue hardship.'" *Id.*

In *Ybarra*, a hazardous waste pollution case, the defendant, on orders from defense counsel, hired an expert to perform soil tests. The expert found certain environmental toxins and presented a report to the defense. The prosecution sought production of the expert's report, asserting that the contents of the report were merely factual recordings and that therefore they were subject to the lesser standard. *Id.* at 194, 777 P.2d at 692. The burden rests on the party who wishes to invade the opposing attorney's privacy to establish reasons adequate to justify a subpoena. *Hickman*, 329 U.S. at 512. The Arizona Supreme Court held that the report would be discoverable only if the prosecution could make the heightened showing required for opinion/theory material. *Ybarra,* 161 Ariz. at 194, 777 P.2d at 692. The court reasoned that since defense counsel initiated the study as part of defense strategy and the study was executed under counsel's direction, the report was more than a gathering of facts – it was the direct result and reflection of the attorney's discretion and opinion. *Id.* at 193, 777 P.2d at 691. Additionally, the court found that the report involved application of complicated formulae to factual recordings, resulting in findings of opinion by the chemical expert:

> Few lawyers can ever learn, much less litigate, [chemical analysis] matters without expert advice. Assuming the adversary process is the best method of attaining the truth, we must encourage lawyers to make the necessary investigations without fear that their very diligence may eventually provide ammunition for the opponent. [Citations omitted.]

> Therefore, we hold that experts retained to investigate and produce reports on technical aspects of specific litigation are part of counsel's "investigative staff" under Rule 15.4(b).

Id. at 192, 777 P.2d at 690.

Ybarra explained a further limitation on discovery of defense work product. Rule 15.4 refers to the American Bar Association's Standards for Criminal Justice § 2.6 (the standard) to define its scope. The standard provides the following:

> This limitation [on discovery of work product], which does not appear in the comparable provision for defense discovery of prosecution reports, has been added to the standard in order to make sure that the *defendant is not required to disclose information that would lighten the prosecutor's burden of establishing guilt beyond a reasonable doubt* or that would undercut the presumption of the defendant's innocence.

Ybarra, 161 Ariz. at 194-95, 777 P.2d at 692-93 [emphasis in original]. The *Ybarra* court interpreted this to mean that defense counsel should not "have the responsibility of helping to prepare the state's case." *Id*. at 194, 777 P.2d at 692. However, the Court noted, "The work product doctrine is not absolute. Like any qualified privilege, a defendant may waive all or part of the protection by electing to present the expert as a witness." *Id*. at 193, 777 P.2d at 691. Thus, once the defense put the expert on the stand, the work product doctrine would not prevent the prosecution from getting the report. The Court also stated, "On any consideration of the work product doctrine, we must consider an additional factor: availability of the item sought in discovery." *Id.* at 194, 777 P.2d at 692. Information available to both parties receives the broadest protection, but information that is unavailable to one side may be discoverable, "ensuring that both parties have equal access to all information necessary for a fair determination of the case." *Id*. Since the State had equal access to the soil in question

and could have hired its own expert, the State could not obtain the defense expert's report.

However, a lawyer forgoes work-product protection for communications with an expert witness concerning the subject of the expert's testimony even if the expert also plays a consulting role. *Emergency Care Dynamics, Ltd. v. Superior Court*, 188 Ariz. 32, 36, 932 P.2d 297, 301 (App. 1997). *Emergency Care Dynamics* was a civil case in which the plaintiffs retained an expert for both consultation and testimony. *Id* at 33, 932 P.2d at 298. The defense sought the expert's file and the plaintiffs protested that the file contained protected work product. *Id.* The Court of Appeals ruled that a party cannot insulate a testifying expert's reports from discovery by also using the expert as a consultant. *Id.* at 36, 932 P.2d at 301 ("An expert may be either a witness or a protected consultant, but not both.") By hiring only one expert for both pretrial consultation and trial testimony, the plaintiffs waived the work product privilege for the consultation that they would have enjoyed if they had hired separate experts for each role. *Id.*